(3)

No. 88-317



# In the Supreme Court of the United States

OCTOBER TERM, 1988

JACK R. DUCKWORTH, PETITIONER

*v.*

GARY JAMES EAGAN

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTION PRESENTED

The United States will address the following question:

Whether the warnings given to respondent, which included advising him that a lawyer will be appointed "if and when you go to court," complied with the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

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**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE SUPPORTING PETITIONER**

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## INTEREST OF THE UNITED STATES

This case presents the question whether warnings given to a suspect, which include advising him that a lawyer will be appointed "if and when you go to court," comply with the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). As a matter of practice, federal law enforcement agents do not include such advice when issuing *Miranda* warnings.[1] Nevertheless, inadvertent departures from

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[1] For, example, the standard *Miranda* warnings issued by the Federal Bureau of Investigation provide in pertinent part (FBI/DOJ Form FD-395 (Rev. 6-22-77)):

> Before we ask you any questions, you must understand your rights.
>
> You have the right to remain silent.
>
> Anything you say can be used against you in court.

routine practice occur from time to time, especially when suspects request an elaboration of the warnings. Moreover, the federal government often accepts for prosecution cases referred by state and local authorities, in which suspects have already been interrogated. The Court's analysis and resolution of this question are therefore likely to have a significant effect upon the admissibility of defendant's statements in federal prosecutions.

## STATEMENT

1. Late on the evening of May 16, 1982, respondent stabbed a woman nine times after she refused to have sexual relations with him. Respondent left the woman lying naked along the shores of Lake Michigan outside of Hammond, Indiana. After returning to Chicago that night, respondent called a Chicago police officer he knew and reported seeing the naked body of a dead woman. Respondent then led Chicago police officers to the woman, who was crying for help. On seeing respondent accompanying the police, the woman asked respondent why he had stabbed her. Respondent explained to the officers that he had been with the woman earlier that evening but that they had been attacked by several men who had then abducted the woman. Pet. App. A4, A10-A12.

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You have the right to talk to a lawyer for advice before we ask you any questions and to have a lawyer with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.



By 7:30 the following morning, the Chicago police officers realized that the crime had been committed in Indiana.[2] They therefore turned the investigation over to the Hammond, Indiana, Police Department, which immediately dispatched two detectives to the lakefront. When respondent told the Hammond detectives that he had been attacked, the detectives took respondent to a police station so that he could file a complaint. After respondent had filled out his report, the detectives asked him to accompany them to police headquarters for further questioning. Pet. App. A4, A12-A13.

At about 11 a.m., Hammond detectives questioned respondent. Before the questioning, the detectives read a waiver form to respondent and asked him if he would sign it. The form provided (Pet. App. A13 n.2; see *id.* at A5):

VOLUNTARY APPEARANCE; ADVICE OF RIGHTS
YOUR RIGHTS

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any

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[2] In the meantime, respondent had accompanied police officers to the hospital where the woman was taken and then had returned with them to the crime site (Pet. App. A12).

time. You also have the right to stop answering at any time until you talk to a lawyer.

Respondent signed the form and gave the detectives an exculpatory statement (Pet. App. A5).[3]

At roughly 4 p.m. the following day, Hammond detectives again interviewed respondent. Before answering questions, respondent signed another waiver form that provided (Pet. App. A15 n. 3; see *id.* at A6):

WAIVER AND STATEMENT

1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.

2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.

[3] The remainder of the form signed by respondent provided (Pet. App. A13 n.2 (brackets in original)):

WAIVER

I, [*Gary Eagan*] have come to the Detective Bureau of the Hammond, Indiana Police Department, of my own choice to talk with Officers * * * In [sic] regard to an investigation they are conducting. I know that I am not under arrest and that I can leave this office if I wish to do so.

Prior to any questioning, I was furnished the above statement of my rights * * *. I have (read) (had read to me) this statement of my rights. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.



3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.

4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.

5. That if I cannot hire an attorney, one will be provided for me.

After reading and signing that form, respondent confessed to stabbing the woman. The following day respondent led the police to the area near Lake Michigan where he had discarded the knife he had used as well as several items of clothing. The knife and clothing were recovered at that location. Pet. App. A6, A17.

2. At trial, respondent sought to exclude testimony relating to the substance of his two statements to the Hammond police as well as the knife and clothing that were recovered. After conducting a suppression hearing, the trial court denied the motion. The statements and the physical evidence were admitted at trial, and respondent was convicted of attempted murder.[4] Respondent was sentenced to a term of 35 years' imprisonment. Pet. App. A6. The Supreme Court of Indiana affirmed respondent's conviction on direct appeal. *Eagan* v. *State*, 480 N.E.2d 946 (Ind. 1985).

3. Respondent thereafter filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana. Respondent claimed, among other things, that his confession was inadmissible because the first waiver form he signed did not comply with the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The court denied the petition, concluding that the record "clearly manifests adherence to *Miranda* * * * especially as to the so-called second statement" (Pet. App. A52).

[4] The jury acquitted respondent of rape (Pet. App. A6).

4. A divided panel of the court of appeals reversed (Pet. App. A3-A48). The majority relied on *United States ex rel. William* v. *Twoomey*, 467 F.2d 1248, 1250 (7th Cir. 1972), which had condemned, as " 'misleading and confusing,' " a warning identical to the one given prior to respondent's first statement, *i.e.*, the advice that a lawyer will be appointed " 'if and when you go to court' " (Pet. App. A7 (citations omitted)). The court explained (Pet. App. A8) that

> [t]he warning suggests erroneously that only those accused who can afford an attorney have the right to have one present before answering any questions; those who are not so fortunate must wait. This language further implies that if the accused does not "go to court," i.e.[,] the government does not file charges, the accused is not entitled to an attorney at all.

The court concluded that the warning was "defective because it denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation" (Pet. App. A8 (citation omitted)), and that the warning's "confusing linkage of an indigent's right to counsel before interrogation with a future event * * * violates *Miranda*" (Pet. App. A8).

Turning to whether respondent's inadmissible first statement tainted his later confession, the court surmised that "[a]s a result of the first warning, [respondent] arguably believed that he could not secure a lawyer during interrogation" and that the second warning "did not explicitly correct this misinformation" (Pet. App. A9). Accordingly, the court remanded the case for a determination whether respondent had knowingly and intelligently waived his right to the presence of an attorney at the second police interview (*ibid.*).



Judge Coffey dissented. Agreeing with those courts of appeals that have upheld warnings identical or similar to the first set of warnings given to respondent,[5] Judge Coffey rejected the majority's "technical and unrealistic application of *Miranda*" and concluded that the initial warnings were constitutionally adequate (Pet. App. A19). Since respondent was told explicitly that he had the right to consult with an attorney before questioning, and to have an attorney present during questioning even if he could not afford to hire an attorney, the fact that an attorney could not be provided on the spot necessarily informed respondent that he need not submit to immediate questioning (Pet. App. A19-A27). "[A]fter evaluating the totality of the information given [respondent]," Judge Coffey concluded (Pet. App. A35) that respondent

> was clearly informed that he had the right to talk to an attorney before the police questioned him, even if he couldn't personally afford to retain one and was specifically advised of his right to appointed counsel.

Even assuming respondent's first statement was inadmissible under *Miranda*, Judge Coffey concluded that a remand was unnecessary because the record showed that respondent's confession was properly received into evidence.[6] Respondent's first statement had been made voluntarily and the warnings he received before his second interview cured any misunderstanding that may have arisen from the first set. Finally, Judge Coffey contended

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[5] See, *e.g.*, *United States* v. *Contreras*, 667 F.2d 976 (11th Cir.), cert. denied, 459 U.S. 849 (1982); *Wright* v. *North Carolina*, 483 F.2d 405 (4th Cir. 1973), cert. denied, 415 U.S. 936 (1974); *Massimo* v. *United States*, 463 F.2d 1171 (2d Cir. 1972), cert. denied, 409 U.S. 1117 (1973); *United States* v. *Lacy*, 446 F.2d 511 (5th Cir. 1971).

[6] Judge Coffey concluded that any error in admitting respondent's initial exculpatory statement was harmless (Pet. App. A46).

that the state trial court had implicitly found that respondent had knowingly and voluntarily waived his *Miranda* rights before confessing and that that factual finding, which the record amply supported, was entitled to a presumption of correctness under 28 U.S.C. 2254(d). Pet. App. A41-A46.

## SUMMARY OF ARGUMENT

The warnings given to respondent before his first interview with the Hammond police satisfied the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The warnings contained all the advice the *Miranda* Court required. The only ground for objection was that in addition to the warnings required by *Miranda*, the Hammond police advised respondent that a lawyer would be appointed for him "if and when you go to court." That additional statement did not undermine the effect of the other warnings. The statement about the appointment of counsel was entirely accurate and did not in any way suggest that only those suspects able to retain counsel had the right to consult counsel before questioning. As most federal and state courts have concluded, informing a suspect that an attorney cannot be appointed for him until he appears in court does not render *Miranda* warnings inadequate as long as the suspect is also told that he has the right to speak with an attorney before questioning and to have him present during questioning.

Advising respondent that a lawyer will be appointed "if and when you go to court," in the context of otherwise complete warnings, did not impermissibly suggest that counsel would not be appointed until after questioning. The advice about the timing of the appointment linked the appointment of counsel with a future event – respondent's initial appearance in court – but the warnings as a whole made clear that questioning would not occur before respondent had an opportunity to consult with counsel unless respondent chose to waive that right. Contrary to the court of appeals' view, we submit that informing a suspect that a lawyer will be appointed "if and when you go to court" is not misleading as long as the suspect is effectively told, as was respondent, that he need not submit to any questioning until he has an attorney appointed for him and has had an opportunity to consult with that attorney.



## ARGUMENT

### RESPONDENT WAS ADEQUATELY INFORMED OF HIS RIGHTS BEFORE QUESTIONING

#### A. Advising A Suspect That A Lawyer Will Be Appointed If And When He Goes To Court Does Not Invalidate Otherwise Proper *Miranda* Warnings

1. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court established certain procedural safeguards to protect the right of an individual, under the Fifth and Fourteenth Amendments, to be free from compelled self-incrimination during custodial interrogation. The Court in *Miranda* concluded that "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" (384 U.S. at 467; see *Moran* v. *Burbine*, 475 U.S. 412, 420 (1986)). The requirement that police give suspects the now-familiar *Miranda* warnings before interrogation was intended "[t]o combat this inherent compulsion" (*Moran*, 475 U.S. at 420) by ensuring that suspects are "effectively apprised of [their] rights," and thus are "permit[ted] a full opportunity to exercise the privilege against self-incrimination" (*Miranda*, 384 U.S. at 467). Accordingly, the Court held, a suspect must be informed that "he has the right to remain silent,

that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires" (*id.* at 479).

2. This Court has never required that the *Miranda* warnings be given in the precise form enunciated in the *Miranda* opinion. To the contrary, in *Miranda* itself the Court stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant" (384 U.S. at 476 (emphasis added); see also *id.* at 479). Thereafter, in *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), the Court referred to "the now familiar *Miranda* warnings * * * *or their equivalent*" (*id.* at 297 (emphasis added)). And, in *California* v. *Prysock*, 453 U.S. 355 (1981), the Court, in upholding the adequacy of warnings that were not given in the exact manner prescribed in the *Miranda* opinion, made clear that "the 'rigidity' of *Miranda* [does not] extend[] to the precise formulation of the warnings given a criminal defendant" (*id.* at 359 (citation omitted)), and that "no talismanic incantation [is] required to satisfy its strictures" (*ibid.*). Rather than requiring a "verbatim recital of the words of the *Miranda* opinion," the Court has looked to whether the particular words used "fully conveyed to [a suspect] his rights as required by *Miranda*" (*id.* at 360, 361).

3. The initial set of warnings given to respondent touched all the points required by the *Miranda* decision.[7]

[7] *Miranda* warnings may not have been required at all, as it is not apparent from the record that respondent was "in custody" at the time he first answered questions. The record shows that respondent was interrogated at a police station and had been in the continuous presence of police officers since he first accompanied the Chicago police to the lakefront earlier that morning. Respondent, however, first requested to go to the Hammond police station in order to lodge a formal complaint, an action consistent with his initial exculpatory statement, and he apparently agreed to go to police headquarters for an interview. Moreover, the waiver respondent signed before that interview expressly stated that he was not under arrest and was free to leave at any time, and respondent was not placed in custody until after he gave his first statement. Pet. App. A4, A12-A13, A13 n.2, A15. Under these circumstances, it is not at all clear that, at the time he submitted to the initial interrogation, respondent was subject to a " 'formal arrest or restraint on freedom of movement' of the degree associated with formal arrest." *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977)). Nevertheless, the State has not argued at any stage of the proceedings that respondent was not in custody, so we do not present that issue as an alternative basis for upholding the admission of respondent's first statement.



The Hammond detectives told respondent that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak with an attorney before questioning and to have the attorney present during any interrogation, and that he had "this right to the advice and presence of a lawyer even if [he could] not afford to hire one" (Pet. App. A5). If the detectives had stopped at that point, no objection could possibly be made regarding the adequacy of the warnings. Nevertheless, the court of appeals held that these complete and nearly verbatim *Miranda* warnings were defective because the detectives also explained to respondent that they could not provide him with a lawyer but that one would be appointed "if and when you go to court" (*ibid.*). The court reasoned that by linking an indigent's right to counsel to a future, conditional event, the statement about the appointment of counsel erroneously suggested that "only those accused who can afford an attorney have the right to have one

present before answering any questions" (*id.* at A8). The court also considered that the statement "implie[d] that if the accused does not 'go to court,' i.e.[,] the government does not file charges, the accused is not entitled to [a lawyer] at all" (ibid.). The court thus concluded that the warnings failed adequately to inform respondent of the right to appointed counsel before interrogation.

a. In reaching that conclusion, the court of appeals misjudged the effect of the statement about the timing of the appointment of counsel, particularly in the context of the information conveyed by the entire set of warnings. First, the statement about the appointment of counsel was entirely accurate. A police officer typically has no authority to appoint counsel for a suspect; only a judicial officer can do so at that individual's initial appearance. See Ind. Code Ann. § 35-33-7-6 (Burns 1985); Fed. R. Crim. P. 5(c). *Miranda* "does not require that attorneys be producible on call, or that a Miranda warning include a time table for an attorney's arrival." *Mayzak* v. *United States*, 402 F.2d 152, 155 (5th Cir. 1968). Nor does *Miranda* require that "the officer conducting the interview declare his personal and immediate power to summon an attorney" (*ibid.*). In *Miranda* itself, the Court made clear that it was not suggesting that "each police station must have a 'station house lawyer' present at all times to advise prisoners" (384 U.S. at 474). All that *Miranda* requires is that the suspect be advised that he has the right not to be questioned without a prior opportunity to consult with counsel and an opportunity to have counsel present during questioning. If the police have no authority to provide an appointed counsel – or if they choose not to provide one – all that *Miranda* requires is that the police not interrogate the suspect unless he waives his right to counsel.



If an indigent suspect seeks any clarification or amplification of the *Miranda* warnings at all, it seems likely that his first question will be when a lawyer will be appointed for him. Surely, it cannot be the case that the officers are not permitted to answer that question, or that an accurate answer will result in the suppression of any statements the suspect may make. Here, the detectives anticipated that question and answered it truthfully as part of the warnings themselves. The inclusion of that information as part of the warnings – rather than as a response to a question by the suspect – should not make a difference for purposes of determining whether the suspect's statement should be admitted at trial.

Contrary to the view taken by the court of appeals, the statement about the timing of the appointment of counsel did not suggest that only those suspects able to retain counsel have the right to have counsel present before questioning. The statement itself merely explained the mechanics of appointing counsel. The previous two warnings – that respondent had the right to talk to a lawyer for advice before questioning, and that he had that right to the advice and presence of a lawyer before questioning even if he could not afford to hire one (Pet. App. A5) – made clear that whether he could hire an attorney or not, respondent had the right to the advice and presence of an attorney before the police could question him. That right to consult with counsel before questioning was reconfirmed when respondent was told that if he chose to answer questions "without a lawyer present" he could stop the interview "at any time until [he has] talked to a lawyer" (*ibid.*). Telling a suspect that an attorney cannot be appointed for him until he goes to court does not vitiate the effectiveness of a warning that he has a right not to be questioned without an attorney being present. It simply

makes clear that until the indigent suspect goes to court and an attorney is appointed for him, the police may not question him unless he waives his right to counsel.[8]

The challenged statement about the appointment of counsel did not suggest that respondent's rights under *Miranda* were somehow conditional. The detective's statement that an attorney would be appointed for respondent "if and when you go to court" meant only that, if respondent requested an attorney before questioning, one would be appointed by the court unless charges were not filed, in which case respondent would be released and not brought to court at all.[9] In other words, the warnings made clear that if respondent chose not to waive his right to consult with counsel before questioning, one of two series of events would occur: either the police would defer questioning until charges were filed, the court appointed an attorney, and that attorney conferred with respondent; or, the police would defer questioning, choose not to file charges, and thus release respondent from custody without questioning him at all. Contrary to the court of appeals' view (Pet. App. A8), nothing in the detective's use

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[8] Indeed, the *Miranda* Court acknowledged that the practice of the Federal Bureau of Investigation, at that time, of informing suspects "of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge" (384 U.S. at 486 (emphasis in original) (internal quotations omitted)), was "consistent with the procedure [the Court] delineate[d]" (*id.* at 484).

[9] Under Indiana law, counsel is appointed at the defendant's initial hearing in court, Ind. Code Ann. § 35-33-7-6 (Burns 1985), and formal charges must be filed at or before that hearing, *id.* § 35-33-7-3(a). In the federal system, the defendant's initial hearing, at which counsel is appointed, can occur before the filing of any indictment or information, Fed. R. Crim. P. 5(a), (c).



of the word "if" undercut the plain message of the warnings—that respondent had the right not to answer questions until an attorney, whether retained or appointed, could be present.

b. Most state and federal courts agree that informing a suspect that an attorney cannot be appointed for him until he appears in court (or that an attorney will be appointed at another time) does not render *Miranda* warnings inadequate, as long as the suspect is also told that he has the right to speak with an attorney before questioning and to have him present during questioning.[10] Taken together, the two statements explain to the suspect that "he [has] the right to put off answering any questions until the time

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[10] See, *e.g.*, *De La Rosa* v. *Texas*, 743 F.2d 299, 302 (5th Cir. 1984), cert. denied, 470 U.S. 1065 (1985); *United States* v. *Contreras*, 667 F.2d 976, 979 (11th Cir.), cert. denied, 459 U.S. 849 (1982); *United States ex rel. Placek* v. *Illinois*, 546 F.2d 1298, 1300-1301 (7th Cir. 1976); *Wright* v. *North Carolina*, 483 F.2d 405, 406-407 (4th Cir. 1973), cert. denied, 415 U.S. 936 (1974); *Massimo* v. *United States*, 463 F.2d 1171, 1174 (2d Cir. 1972), cert. denied, 409 U.S. 1117 (1973); *Tasby* v. *United States*, 451 F.2d 394, 398-399 (8th Cir. 1971), cert. denied, 405 U.S. 992 (1972); *United States* v. *Lacy*, 446 F.2d 511, 513 (5th Cir. 1971) (per curiam); *United States* v. *Lamia*, 429 F.2d 373, 376-377 (2d Cir.), cert. denied, 400 U.S. 907 (1970); *Klingler* v. *United States*, 409 F.2d 299, 308 (8th Cir.), cert. denied, 396 U.S. 859 (1969); *Coyote* v. *United States*, 380 F.2d 305, 308 (10th Cir.), cert. denied, 389 U.S. 992 (1967); *Schade* v. *State*, 512 P.2d 907, 915-916 (Alaska 1973); *State* v. *Maluia*, 56 Haw. 428, 431-435, 539 P.2d 1200, 1205-1207 (1975); *Emler* v. *State*, 259 Ind. 241, 243-244, 286 N.E.2d 408, 410-411 (1972); *People* v. *Campbell*, 26 Mich. App. 196, 201-202, 182 N.W.2d 4, 6-7 (1970), cert. denied, 401 U.S. 945 (1971); *Harrell* v. *State*, 357 So. 2d 643, 645-646 (Miss. 1978); *People* v. *Swift*, 32 A.D.2d 183, 186-187, 300 N.Y.S.2d 639, 643-644 (1969), cert. denied, 396 U.S. 1018 (1970); *Rowbotham* v. *State*, 542 P.2d 610, 618-619 (Okla. Crim. App. 1975); *Jones* v. *State*, 69 Wis. 2d 337, 343-345, 230 N.W.2d 677, 682-683 (1975).

when he [does] have an appointed attorney." *United States* v. *Lacy*, 446 F.2d 511, 513 (5th Cir. 1971) (per curiam). As the Second Circuit explained under identical circumstances, "[t]he only conclusion [the suspect] would have been justified in reaching on the basis of the warning was that, since he was clearly entitled to have a lawyer present during questioning, and since no lawyer could now be provided, he could not now be questioned." *Massimo* v. *United States*, 463 F.2d 1171, 1174 (2d Cir. 1972), cert. denied, 409 U.S. 1117 (1973).

A minority of federal and state courts, including the court of appeals in this case, have held such warnings inadequate.[11] Those courts have disapproved the departure from the formulation sanctioned in *Miranda* and have generally reasoned, as did the court of appeals in this case, that inserting conditional language into *Miranda* warnings undercuts the advice that the suspect has the right to appointed counsel before any questioning. The insistence on strict adherence to the language of the *Miranda* warnings, however, cannot be squared with this Court's admonition in *Prysock* that "the 'rigidity' of *Miranda* [does not] extend[] to the precise formulation of the warnings given to a criminal defendant" (453 U.S. at 359). Small variations in the language used "are far less important than whether the differences threaten achievement of the purpose of the warnings." *United States* v. *Sanchez*, No. 88-1706 (7th Cir. Sept. 30, 1988), slip op. 4. And, as we have discussed above, the minority view is not only unjustifiably rigid, it ignores the more sensible and straightforward interpretation of the warnings taken as a whole.

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[11] See, *e.g.*, *Gilpin* v. *United States*, 415 F.2d 638, 640-641 (5th Cir. 1969); *Lathers* v. *United States*, 396 F.2d 524, 535-536 (5th Cir. 1968); *Square* v. *State*, 283 Ala. 548, 550, 219 So. 2d 377, 378-379 (1969); *Moore* v. *State*, 251 Ark. 436, 442-443, 472 S.W.2d 940, 944 (1971); *Commonwealth* v. *Johnson*, 484 Pa. 349, 352-357, 399 A.2d 111, 112-114 (1979); *State* v. *Creach*, 77 Wash. 2d 194, 199-200, 461 P.2d 329, 332-333 (1969).



### B. Advising Respondent That A Lawyer Would Be Appointed If And When He Went To Court Does Not Link The Right To Counsel To An Event Occurring After Questioning

1. In *California* v. *Prysock*, *supra*, the Court suggested that *Miranda* warnings would be inadequate "if the reference to the right to appointed counsel was linked [to a] future point in time after the police interrogation" (453 U.S. at 360). The court of appeals relied on that statement from *Prysock* in finding fault with the advice given by the police in this case. But there is a critical difference between the warning at issue in this case and the warning that the Court in *Prysock* said would be improper. *Prysock* criticized a suggestion that counsel would be appointed "after police questioning." In this case, there was no suggestion that the appointment of counsel would occur after questioning. To the contrary, the warning made clear that, absent a waiver, an indigent suspect had the right to consult with counsel *before* questioning, regardless of when the appointment occurred.

A review of the cases cited by the *Prysock* Court—*United States* v. *Garcia*, 431 F.2d 134 (9th Cir. 1970) (per curiam), and *People* v. *Bolinski*, 260 Cal. App. 2d 705, 67 Cal. Rptr. 347 (1968)—makes it clear that the court of appeals was mistaken in relying on *Prysock* as support for its decision. In *Garcia*, the defendant had been advised that she could "have an attorney appointed to represent you when you first appear before the U.S. Commissioner or the Court" (431 F.2d at 134). The court concluded that the warnings were inadequate because they informed the defendant only of her right to the presence of counsel "when she answered any questions," and not "of her right to counsel before she said [a word]" (*ibid.*). In *Bolinski*, one set of warnings advised the accused that counsel would be appointed "if he was charged" (260 Cal. App. 2d

at 718, 67 Cal Rptr. at 355), and the other set of warnings informed the defendant that an attorney would be appointed after he was transferred to California from his present location in Illinois (260 Cal. App. 2d at 723, 67 Cal. Rptr. at 358). Both sets of warnings were held inadequate because they failed to explain that the accused was entitled to have a lawyer present at the interrogation, let alone that counsel could be appointed for that purpose (260 Cal. App. 2d at 718, 720, 67 Cal. Rptr. at 355, 356).

The flaw in the *Miranda* warnings at issue in *Garcia* and *Bolinski*, therefore, was linking the appointment of counsel to a future event occurring *after interrogation*. The warnings in those cases tended to mislead the indigent suspect by failing to make clear that he could postpone questioning until he had a lawyer. *Prysock* thus casts doubt on the validity only of those warnings that link the appointment of counsel to a future event occurring after interrogation. It does not condemn warnings that simply link the appointment of counsel to some future event.

2. Here, respondent was told that he had the right to talk to a lawyer before any questioning and to have a lawyer present during questioning. He was told that he had this "right to the advice and presence of a lawyer" even if he could not afford one. And he was informed that a lawyer would be appointed for him, if he wished, when he appeared in court. That warning certainly linked the appointment of counsel to a future event—respondent's initial appearance in court—but that statement, taken together with the entire set of warnings, made clear that, absent a waiver, the future event would occur before any questioning. Read as a whole, the warnings did not suggest, let alone state, that respondent would enjoy the right to the advice and presence of a lawyer only after he submitted to questioning. The warnings given to respondent therefore satisfied the requirements of this Court's decision in *Miranda*.



One problem with any close analysis of the language used in pre-interrogation warnings is that focusing on the precise wording used in the warnings tends to obscure the basic point of *Miranda*: to ensure that a suspect does not waive his right to remain silent either because of the pressures inherent in custodial interrogation or because he does not understand that his words can be used against him in court. The *Miranda* warnings are not prescribed by statute or rule, nor are they mandated by the Constitution. The warnings have constitutional significance only because this Court has held that giving a suspect those warnings is one effective way to ensure that the suspect's waiver of his right to remain silent is valid. Therefore, rather than measuring particular warnings against the words of the *Miranda* opinion, the Court should determine whether the warnings in each case provide the suspect with the information he needs to make a constitutionally binding decision to speak with the police. Viewed in that way, the warnings given to respondent were unimpeachable. They advised him, in the clearest possible language, of his right to remain silent; the consequences of waiving that right; the right to consult with counsel before questioning and to have counsel present during questioning if respondent chose to speak with the police; the right to the advice and presence of counsel even if respondent could not afford to hire a lawyer; and the right to stop answering questions at any time. It is hard to credit the claim that, armed with all that information, respondent's waiver of his right to remain silent was nonetheless rendered involuntary because he was told, accurately, that

the police were not authorized to appoint a lawyer for him.[12]

[12] Even assuming the first warnings given to respondent were inadequate under *Miranda*, the court of appeals erred in remanding the case for a determination whether respondent had waived the right to the presence of counsel before confessing to the detectives. In our view, the record shows that respondent had waived that right after receiving proper *Miranda* warnings. First, as even the court of appeals concluded, respondent's confession "was made voluntarily" (Pet. App. A9), and there is no evidence in the record that the detectives acted coercively. See *Colorado* v. *Connelly*, 479 U.S. 157, 167 (1986). Second, respondent confessed after receiving complete and accurate *Miranda* warnings. See *Oregon* v. *Elstad*, 470 U.S. 298, 318 (1985). Third, even if there was a flaw in the first warnings, there was no such flaw in the second set, which made clear that respondent had the right to the advice and presence of an attorney before questioning, and that "if [respondent could not] hire an attorney, one will be provided for [him]" (Pet. App. A15 n.3). Under these circumstances, respondent clearly waived the right to the presence of counsel before confessing and thus a remand was unnecessary.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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